IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Samina Sultan, Plaintiff, v. M&T Bank and Bayview Loan Servicing, LLC, Defendant.	))))))))))	Case No. 16-cv-08767 Hon. John J. Tharp, Jr.

MOTION TO DISMISS

NOW COME Defendants, M&T Bank and Bayview Loan Servicing, LLC, by and through its counsel, Smith & Weik, LLC, and pursuant to Fed. R. Civ. P. 12(b)(6), move this Court to Dismiss Plaintiff, Samina Sultan's Complaint, and in support thereof, states and alleges as follows:

I. INTRODUCTION

On September 8, 2016, Plaintiff filed a four count complaint against M&T Bank ("M&T) and Bayview Loan Servicing, LLC ("Bayview") (collectively "Defendants"). The allegations in the Complaint relate to a loan modification agreement entered into between Plaintiff and M&T. Complaint, ¶ 9. The Complaint apparently asserts that due to a mathematical error the adjusted modified unpaid principal balance shown on the loan modification agreement was increased by $21,300.00. Plaintiff now claims Defendants have violated the Truth in Lending Act ("TILA"); the Illinois Consumer Fraud and Deceptive Business Practices Act ("Consumer Fraud Act"); and the Fair Debt Collection Practices Act ("FDCPA"). For the reasons set forth below, all counts should be dismissed for failure to state a claim.

II. LEGAL AUTHORITY

To survive a motion to dismiss under Rule 12(b)(6), a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556

U.S. 662, 678 (2009) (citation omitted); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."). The specificity required to state a plausible claim depends on the complexity of the legal theory asserted. *McCauley v. City of Chicago*, 671 F.3d 611, 616-17 (7th Cir. 2011). Regardless of the theory, only well-pled facts are accepted as true. *Id*. at 616. Legal conclusions, conclusory allegations, and formulaic recitations of the elements of a claim are not accepted as true. *Id*. A court may consider documents attached to a motion to dismiss if they are referred to in the plaintiff's complaint or central to the plaintiff's claim. *Levenstein v. Salafsky,* 164 F.3d 345, 347 (7th Cir. 1998) (quoting *Wright v. Associated Ins. Cos., Inc.,* 29 F.3d 1244, 1248 (7th Cir. 1994)).

III. ARGUMENT

A. TILA Regulations Do Not Apply to Loan Modification Agreements.

Count I and II of the Complaint asserts that M&T violated Section 1638 and Section 1635 of TILA for the failure to provide certain material disclosures at the time the loan modification was originated. Specifically, Plaintiff asserts M&T should have disclosed 1) annual percentage rate, 2) finance charge, 3) amount financed, 4) total amount of payments to be made, 5) payment schedule, 6) notice of right to rescind, and 7) itemization of payments to third parties. However, a loan modification agreement, such as the one referred to in the complaint, see paragraph 9, does not constitute a refinancing of the original obligation.

The implementing regulation for TILA is Reg. Z (12 C.F.R. Part 226). Reg. Z states that a refinancing of an existing obligation requires new disclosures to the consumer. Reg. Z defines a refinancing as follows:

> (a) Refinancings. A refinancing occurs when an existing obligation that was subject to this subpart is satisfied and replaced by a new obligation undertaken by the same consumer. A refinancing is a new transaction requiring new disclosures to the consumer. The new finance

> charge shall include any unearned portion of the old finance charge that is not credited to the existing obligation. The following shall not be treated as a refinancing:

12 C.F.R. § 226.20(a).

It is clear that TILA disclosures are required when a loan is refinanced. However, loan modifications, which are not refinancing, are not subject to the TILA disclosure requirement. The Seventh Circuit, in interpreting the Official Staff Commentary to Reg. Z, noted that, "Treating economic equivalence as 'refinancing' would destroy the distinction between the initial extension of credit (to which the Act applies) and subsequent arrangements (to which it does not). . . . But the Federal Reserve has not been silent; its Official Staff Commentary says: Changes in the terms of an existing obligation, such as the deferral of individual installments, will not constitute a refinancing unless accomplished by the cancellation of that obligation and the substitution of a new obligation. Official Staff Commentary to 12 C.F.R. § 226.20(a) (12 C.F.R. Pt. 226, Supp. I, p. *913 399)." *Jackson v. Am. Loan Co., Inc.*, 202 F.3d 911, 912–13 (7th Cir. 2000) (citing *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566-68, 100 S.Ct. 790, 63 L.Ed.2d 22 (1980) (recognizes that the Official Staff Commentary provides lenders with a defense to claims based on conduct that took place while the Commentary was in force) and 15 U.S.C. § 1640(f).

Further, the Official Staff Interpretation to 12 C.F.R. § 226.20(a) (12 C.F.R. Pt. 226, Supp. I) states, "In any form, the new obligation must completely replace the prior one." Plaintiff does not attach a copy of the loan modification agreement at issue to the Complaint, and Defendants therefore attach the loan modification agreement hereto as Exhibit A. Because the loan modification agreement is referred to in the Complaint and is central to Plaintiff's claim, this Court can rely upon the document without converting the Rule 12(b)(6) motion into a motion for summary judgment. *Venture Associates Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993).

The loan modification agreement states that it “amends and supplements” the note. The modification additionally states, “the Borrower and Lender agree to modify the terms of the Note and Security Instrument as follows. The Borrower and Lender agree that the provisions of this Modification supersede and replace any inconsistent provisions set forth in the Note and Security Instrument.” Further, the modification states, “Nothing in this Modification shall be understood or construed to be a satisfaction or release in whole or in part of the Note and Security Instrument.” Therefore, because the loan modification agreement did not cancel the original obligation and substitute it with a new obligation it was not a refinancing and no new disclosures were required either by TILA or Reg. A. Thus, Counts I and II fail to state a claim for which relief can be granted and must be dismissed.

B. The Complaint Fails to Allege an ICFA Claim.

As asserted above, the creditor was not required to provide Plaintiff with any TILA disclosures when Plaintiff executed the loan modification agreement. Thus, this cannot be the basis of an ICFA claim. “Unlike TILA, the ICFA “does not mandate any particular form or subject of disclosure, but rather is a general prohibition of fraud and misrepresentation.” *Lanier v. Associates Finance, Inc.*, 114 Ill.2d 1, 101 Ill.Dec. 852, 499 N.E.2d 440, 447 (1986). To impose liability under the ICFA, a plaintiff must show (1) that the defendant engaged in a deceptive act or practice; (2) that the defendant intended the plaintiff to rely on the deception; and (3) that the deception occurred in the course of conduct involving trade or commerce. *Martin v. Heinold Commodities,* Inc., 163 Ill.2d 33, 205 Ill.Dec. 443, 643 N.E.2d 734, 754 (1994). However, a ‘defendant's compliance with the disclosure requirements of the Truth in Lending Act is a defense to liability under the Illinois Consumer Fraud Act....’ *Lanier,* 101 Ill.Dec. 852, 499 N.E.2d at 447.” *Greisz v. Household Bank (Illinois),* 8 F. Supp. 2d 1031, 1043 (N.D. Ill. 1998), modified (Aug. 6, 1998), aff'd sub nom. *Greisz* *v. Household Bank (Illinois), N.A.*, 176 F.3d 1012 (7th Cir. 1999). Defendants' compliance with TILA defeats the ICFA claim.

Additionally, Plaintiff has failed to plead the ICFA claim with the requisite specificity. Plaintiff alleges that Defendants misrepresented certain information. The pleading requirements of a cause of action under ICFA are similar to pleading requirements for fraud. *Gallagher Corp. v. Mass. Mutual Life Ins. Co.,* 940 F.Supp. 176, 180 (N.D.Ill 1996). Rule 9(b) requires a pleading to "state with particularity the circumstances constituting fraud." Fed.R.Civ.P. 9(b); *Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 737 (7th Cir. 2014). Here the Complaint fails to plead any of the elements of an ICFA claim. A "formulaic recitation of the elements of a cause of action will not do." *Ashcroft v. Iqbal,* 556 U.S. 662, 677, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

Finally, because Plaintiff is a private party, an action brought under the ICFA requires Plaintiff to show she suffered "actual damage" as a result of Defendants' purported violation of the act. *See, Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 739 (7th Cir. 2014) (citing 815 ILCS 505/10a; *Kim v. Carter's Inc.,* 598 F.3d 362, 365 (7th Cir. 2010); *Mulligan v. QVC, Inc.,* 382 Ill.App.3d 620, 626 (1st Dist. 2008). In a private ICFA action, the element of actual damages "requires that the plaintiff suffer actual pecuniary loss." *Kim,* 598 F.3d at 365 (internal citation omitted).

Plaintiff's actual damages must arise from "purely economic injuries." *Thrasher-Lyon v. Illinois Farmers Ins. Co.,* 861 F. Supp. 2d 898, 912 (N.D. Ill. 2012) (citing *Cooney v. Chi. Pub. Schs.,* 407 Ill.App.3d 358, 365 (1st Dist. 2010). "Actual damages must be calculable and measured by the plaintiff's loss. *Morris,* 331 Ill.Dec. 819, 911 N.E.2d at 1053; *see also Price v. Philip Morris, Inc.,* 219 Ill.2d 182, 302 Ill.Dec. 1, 848 N.E.2d 1, 55 (2005) (Karmeier, J. concurring) (noting that a plaintiff must allege that she was harmed in a concrete, ascertainable way, meaning that the defendant's deception made plaintiff tangibly worse off). Additionally, emotional damages do not constitute actual damages under the ICFA. *Morris,* 331 Ill.Dec. 819, 911 N.E.2d at 1053 (affirming trial court's dismissal of plaintiff's claim for relief under the ICFA where plaintiff alleged only emotional damages)." *Thrasher-Lyon,* 861 F. Supp. 2d at 912-13 (internal quotes omitted). Here, the Complaint does not allege any actual damages resulting from a purported misrepresentation, only "stress and anxiety." Without actual damages the emotional damages are not compensable under ICFA.

C. The Complaint Fails to Assert the Loan Modification Agreement Was an Attempt to Collect a Debt.

The Complaint asserts Bayview violated the FDCPA by misrepresenting the amount owed in the loan modification agreement. To state a claim under the FDCPA, Plaintiff must allege that (1) Bayview qualifies as a debt collector as defined in § 1692a(6), (2) the actions of which Plaintiff complains were taken in connection with the collection of any debt and (3) the actions violated one of the FDCPA's substantive provisions. *See Gburek v. Litton Loan Servicing LP*, 614 F.3d 380, 384 (7th Cir. 2010). The Complaint does not allege that Bayview's actions occurred in the course of collecting a debt. Therefore, Count IV fails to state a claim for which relief can be granted and must be dismissed.

IV. CONCLUSION

For the reasons set forth above, Defendants M&T and Bayview request the Court dismiss Plaintiff's claims with prejudice and without leave to replead, and for such other relief as this Court deems just.

Respectfully submitted,
M&T Bank, and
Bayview Loan Servicing, LLC

By: /s/ Jonathan D. Nusgart .
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CERTIFICATE OF SERVICE

I hereby certify that on October --, 2016, I filed the above pleading via the court's CM/ECF system and notice will be served to all registered parties by electronic notice.

By: /s/ Jonathan D. Nusgart .